

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1283

To be argued by
Allan M. Pepper

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 77-1283, 77-1289, 77-1365

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALBERT DUKE, DONALD NIANG &
ALBERT WILLIAMS,

Defendants-Appellants.

On Appeal From the United States District Court
for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT ALBERT DUKE

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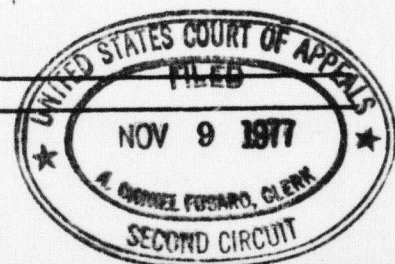


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ALBERT DUKE

ARGUMENT

POINT I

DUKE'S CONVICTION FOR A PRIOR SIMILAR
CRIME SHOULD NOT HAVE BEEN ADMITTED

The Government claims in its brief that Duke's prior conviction was admissible to prove his unlawful intent (Br. Point IV, p. 29 et. seq.).* This is based on the Government's ipse dixit that the prior conviction "was overwhelmingly probative of the fact that his possession of the

*"Br." refers to the brief of the Government.

securities in this case could have been, and was not, innocent, but rather was with knowledge of their stolen character and intent to deal with them." (Br. 30)* However, the Government wholly failed to meet the criteria established by this Circuit, reflected in cases it cites, requiring sufficient connection between the prior conviction and the crime charged as a threshold test of admissibility on this issue.

Prior convictions are not automatically admissible on the issue of intent. As Judge Learned Hand explained in United States v. Brand, 79 F.2d 605, 606 (2d Cir.), cert. denied, 296 U.S. 655 (1935), where the issue was the admission of a prior sale by defendant of another stolen car in a case involving transportation of a stolen motor car in interstate commerce:

"The judge must decide each time whether the other instance or instances form a basis for sound inference as to the guilty knowledge of the accused in the transaction under inquiry; that is all that can be said about the matter. If, for example, the subject of the indictment were the last of a series of purchases from the same thief, the earlier purchases would be competent, for thieves are unlikely to risk repeated transactions with innocent buyers. Again if a number of purchases were of goods of the same kind, mere coincidence is less probable as their number increases."

*The Government claims Duke's counsel below conceded that the conviction was admissible on the issue of intent. While the record may show that counsel below was not precise, it is clear that he objected strenuously and at every opportunity to the introduction of the prior conviction.

See also, United States v. Baum, 482 F.2d 1325, 1330-1331 (2d Cir. 1973) (quoting from and adopting Judge Hand's analysis).

No such analysis was made in the instant case; the Government relied solely on the bare fact of the prior conviction. It made no effort to show an identity of operation, as in United States v. Schaffer, 266 F.2d 435, 442 (2d Cir. 1959), aff'd, 362 U.S. 511 (1960) cited by the Government in its brief, in which proof of prior similar criminal dealings "showed the same use of manufacturers' . . . wholesale prices as did the evidence concerning the transactions alleged in the indictment." (emphasis added) Nor did the Government make an effort to show a series of earlier purchases, nor that there was a single plan or one course of conduct involving both incidents. See, e.g., United States v. Grady, 544 F.2d 598, 604-605 (2d Cir. 1976); United States v. Chestnut, 533 F.2d 40, 49-50 (2d Cir.), cert. denied, 429 U.S. 829 (1976). Thus, it is submitted that the criminal conviction was insufficient by itself to be probative on the issue of Duke's knowledge of the stolen character of the particular securities he was alleged to have possessed.

But even if the prior conviction were prima facie admissible, the trial judge should have exercised his discretion and excluded it. Lack of intent was never raised as a defense. In addition, there was other compelling evidence of intent, which rendered the conviction cumulative.

Finally, Duke's counsel below agreed to a stipulation in an attempt to meet the Government's objective of putting in additional evidence on intent while excluding the prejudice inherent in a prior conviction. The trial judge should have balanced these factors and excluded the prior conviction; however, the record does not show that he exercised his discretion at all, and this failure alone is ground for reversal.

It is obvious that the admission of a prior conviction has prejudicial impact; the Government so admits (Br. 32). Because of this prejudice a prior conviction should only be admitted when its use is essential. This Court has pointed out, while explaining its holding in United States v. Byrd, 352 F.2d 570 (2d Cir. 1965), that "where the probative value of evidence of another similar crime offered by the Government in its main case is slight and prejudice is substantial, 'the better practice would be to sustain the objection to the offer . . . without prejudice to its re-offer in rebuttal, if then warranted.'" United States v. Deaton, 381 F.2d 114, 118 n. 3 (2d Cir. 1967). Here, defendant Duke made no claim that he innocently or accidentally came into possession of the Potomac Electric Power Company stock. Since the issue of intent was not a contested issue for the jury, Duke's prior conviction was not essential, and the trial judge

should have excluded it (with the proviso that the Government could use it in rebuttal). Failure to do so was an abuse of discretion. See, United States v. Beechum, 555 F.2d 487, 492 (5th Cir. 1977) (there must be "substantial need" for the evidence); United States v. Taglione, 546 F.2d 194, 199 (5th Cir. 1977).

There are two other reasons why the trial judge should have exercised his discretion to exclude the prior conviction. First, Duke's alleged statements to Agent Hauss with respect to numerous criminal dealings in securities, including the particular securities involved here, if believed, provided the evidence from which the inference would be virtually compelled that Duke had knowledge of their stolen character. Thus, if the jury believed Agent Hauss that Duke was the seller of the securities, it certainly would have believed his testimony as to Duke's statements concerning their stolen nature, without the necessity of introducing the conviction.*

Second, Duke's trial counsel offered to stipulate that Duke had knowledge of securities and of the securities business. Since the prior conviction was allowed solely on the issue of intent, that element could have been supplied by that stipulation, from which a jury could reasonably have inferred that Duke had knowledge

*Rule 403 of the Federal Rules of Evidence provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . needless presentation of cumulative evidence."

of the stolen character of the Potomac Electric Company stock.*

Finally, even if any one of these factors was insufficient, the three factors together should have resulted in the exclusion of the evidence. In other words, because intent was not raised, the Government should have been required to defer the issue, at least in this case, in which there was other evidence of intent and counsel offered a stipulation on the issue. And, as noted in our main brief, the conviction was especially prejudicial here, because it undercut Duke's alibi witnesses on an issue other than intent and left the jury with the impression that Duke was the kind of person who would engage in illegal acts.

But the record is barren of consideration by the trial judge of these compelling considerations against use of the prior conviction, or of any other possible solution short of admission of the conviction. This, by itself, is error requiring reversal. In stating that the trial Court did exercise its discretion, the Government argues only that it deferred ruling on the point until all of the Government's other evidence was in, "thus

*If Duke's offer to stipulate that he had knowledge of securities "had no bearing" on the issue of his knowledge of the stolen character of the Potomac securities, as the Government suggests (Br. 31), then similarly, evidence of Duke's prior conviction has no probative value on that issue either.

giving the court the full opportunity to assess the conviction's probative value." (Br. 32) But there is a difference between deferring a decision and giving it consideration. The record contains no hint of the trial judge's reasoning, nor of any attempt to balance prejudice against probative value, nor the kind of imaginative balance, suggested forcibly by Duke's counsel below in offering a stipulation, such as that adopted by Judge Weinstein in United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975), discussed in Duke's main brief (pp. 36-37).*

Unfortunately, the Government resorts to distortion of the record in claiming that any such balance should have come out in favor of admissibility because Duke's "trial strategy" included the defense that the FBI was trying to "frame" him because he was a Muslim with a prior record (Br. 33). The record shows only counsel's periodic references, made in vague and circumspect manner, to the existence of "some blemish on [defendant's] record." Counsel's efforts to venture into Duke's prior relationship with the FBI were rebuffed

*The Government's attempt to distinguish United States v. Dwyer, 539 F.2d 924 (2d Cir. 1976) is curious. The Government says this case is different from Dwyer because here "the prejudicial impact, if any, of the proffered evidence was evident and was often enunciated by counsel." (Br. 33) But surely the principle of Dwyer is that the trial court should place the reasons for such rulings in the record so that this Court can have a basis for review; not, as the Government contends, that such a record need only be made when it is unclear what the prejudicial impact of admitted evidence may be.

by the trial judge -- hence it is impossible to ascertain from the record what Duke's counsel was attempting to establish. (e.g., trial transcript 375-76) But it would be the height of irony -- and unfairness -- to use these attempts to make out some defense, whatever it was, aborted by the trial judge's rulings, as a basis for sustaining the admission of this prejudicial evidence. Significantly, Duke's counsel below made no reference to this "defense" in this summation, and a fair reading of the record makes manifest that Duke's defense was based on his alibi witnesses.

Indeed, this argument by the Government is further evidence that the trial court failed to do the kind of balancing required here. Nothing in the record indicates that the trial judge admitted the prior conviction because Duke was asserting the defense that he was being "framed" because of a prior conviction; this argument is made by the Government for the first time here. In fact, if anything, the record indicates the contrary is true; the conviction was admitted solely on the issue of intent. Accordingly, the record does not permit this Court to hold that the trial judge balanced prejudice against probative value and allowed the prior conviction on the ground now asserted by the Government.

POINT II

THERE WAS INSUFFICIENT INDEPENDENT PROOF
OF DUKE'S INVOLVEMENT IN THE CONSPIRACY
ALLEGED AND PROVED AT TRIAL TO PERMIT THE
ADMISSION OF DECLARATIONS OF CO-CONSPIRATORS

The circumstantial evidence used by the Government at trial, and capsulized in its brief in an attempt to establish Duke's participation in the alleged conspiracy by independent proof (Br. 35-36), consisted of Duke's mere association with Niang and Williams and certain statements allegedly made by a person identified as Duke by FBI witnesses. These were insufficient bases for allowing co-conspirator statements.

In large part, the independent evidence of Duke's involvement consisted of Duke's "association" with defendants Niang and Williams, individuals allegedly involved in criminal activities. The record contains no evidence regarding any conversations or stock transfers that occurred when Duke was alleged to have met with Niang and Williams while Barbine was nearby. Thus, no legally permissible inference, suggesting Duke's involvement in the particular criminal conspiracy alleged, can logically be drawn from such unexplained contacts.

Similarly, with respect to Duke's alleged statements to Agent Hauss, no single statement, or group of statements taken together, tend to connect Duke in any

logical manner with the specific conspiracy alleged in the indictment. Although those statements would tend to connect Duke to some unspecified illegal activity, other than the fact that Duke was on trial with certain alleged co-conspirators, nothing Duke said to Agent Hauss in a general and vague way about freshly taken stock, or similar expressions, would lead anyone to connect Duke to these alleged co-conspirators. For example, the Government argues that the trial court could have inferred that Duke's alleged statement that he had people flying in from out of town was an attempt to convince Agent Hauss to continue dealing with him by describing the scope of his operation. (Br. 37) But, even if that inference is drawn, no connection is established with the specific conspiracy of which Duke was convicted. As pointed out in our main brief (p. 18, n.*), because the alleged co-conspirators here had already made their last trip to New York, that reference was either to other persons or untrue. In other words, if Duke was "describing his operation," as the Government contends, it was a different operation from the one which was the subject of Barbine's testimony at trial. While the Government may not be required to negate all possible innocent inferences (Br. 37, n.*), it does have the burden of adducing facts that logically permit an inference of guilt to arise.* Here the facts do not permit an inference

*For example, in the United States v. Singleton, 532 F.2d 199, 203 (2d Cir. 1976), cited by the Government, the basic

of connection with the particular conspiracy which was the subject of the trial.*

In a footnote (Br. 38) the Government suggests that statements made by Niang and Williams that they were going to meet Duke were admissible both as statements of their present intent pursuant to Rule 803(3) of the Federal Rules of Evidence and as so-called verbal acts. However, to the extent that those statements were offered "in evidence to prove the truth of the matter asserted,"** (i.e., Duke's involvement in the conspiracy) rather than to prove the declarants' intentions as evidence against the declarants, it is inadmissible hearsay. Indeed, Rule 803(3) specifically limits the mental condition exception

fact proved was that defendant was the only occupant of a car when a rolled-up jacket, containing stolen checks involved in the charged crime, came flying out of that car's window. This basic fact, the Court concluded, was sufficient for the jury to properly infer guilty possession.

* Moreover, as discussed in Point IV, *infra*, the Government's use of these statements as the independent evidence that Duke was part of the conspiracy is inherently circular. The issue at trial was whether Duke was the person who made those statements to Agent Hauss. The co-conspirator statements taken subject to connection, which indicated Duke's criminal involvement with Niang and Williams, must have had a profound effect on the jury's determination that it was Duke that Hauss dealt with. Accordingly, to use the statements to the FBI as the basis for admitting that hearsay is bootstrapping of the first order.

**Rule 801 of the Federal Rules of Evidence.

to the hearsay rule by excluding "a statement of . . .
belief to prove the fact . . . believed"*

POINT III

THE EVIDENCE AT TRIAL SHOWED MULTIPLE CONSPIRACIES

In order to prove a single conspiracy, the Government must show that the alleged participant had knowledge of the existence of the others in the conspiracy. However, in large conspiratorial chains, involving ongoing relationships, this Court has permitted the inference of one conspiracy even when the defendant did not have actual knowledge concerning others on the ground that in such circumstances each conspirator had "reason to know" of the

*The cases cited by the Government in its footnote are in accord with this limited purpose analysis. See, e.g., United States v. Ortiz, 553 F.2d 782 and 783-784 (2d Cir. 1977) (hearsay testimony by an informer might be admissible because they served as proof of the informer's state of mind); United States v. Head, 546 F.2d 6, 9 (2d Cir. 1976) (a co-conspirator's "verbal act" testimony that he came to the United States to collect money from another co-conspirator was not admissible to establish that money was owed, although it was admissible to explain his presence in the United States); United States v. Frank, 494 F.2d 145, 154-155 (2d Cir.), cert. denied, 419 U.S. 828 (1974) (statements of a co-conspirator to a notary were not received to prove the truth of the matter asserted in the statement, but to prove his knowledge of facts otherwise established or to shed light on his several transactions with the notary).

existence of others. In its brief, the Government concedes that this is not the kind of large narcotics conspiracy in which this Court has allowed such an inference in the absence of actual knowledge (Br. 40-41).

The Government misapprehends Duke's main brief in saying that to require it to meet the criteria of such cases as United States v. Moten, Dkt. No. 77-1085, slip. op. 5769 (2d Cir., September 6, 1977), would "hold the conspiracy laws inapplicable to single transactions" (Br. 41). The Government could still prove a conspiracy by showing actual knowledge; but the cases clearly require that absent such actual knowledge, the Government must demonstrate "reason to know" by showing the existence of an ongoing and complex conspiratorial scheme, such as the usual narcotics conspiracy, which it admits simply did not exist here. Accordingly, the "reason to know" analysis is inapplicable, and the Government was required to show actual knowledge.*

The so-called "facts" the Government cites to establish Duke's actual knowledge of the scope of the

The Government, in essence, concedes Duke's argument that under the analysis used by Judge Mulligan in his concurring opinion in United States v. LaVecchia, 513 F.2d 1210 (2d Cir. 1975) and adopted by the Court in Moten, supra, there were multiple conspiracies here. (See Br. 42, n.)

conspiracy alleged do not support such a conclusion. One cannot infer that Duke was engaged in a conspiracy with Niang, Albert Williams, Barbine, Crosby, Pruitt Williams, Adams, and the others from Barbine's mere presence at Duke's alleged meetings with Niang and Albert Williams (the substance of which is unknown), other than by rank speculation. Even if the jury were permitted to infer that Duke obtained the stock from Niang and Williams -- which, as demonstrated in the Point II, supra, it could not -- that hardly proves that the conspiracy was a single one involving the Toledo group, whose activities were removed from Duke in both time and place.

The alleged statements to Agent Hauss were similarly insufficient. For instance, as noted above, the alleged statement referring generally to unspecified persons flying in from out of town with stolen stock must have referred to other stock because all the stock involved here was already in New York. And the general statement that he could obtain Treasury bonds from unnamed sources affords no basis to connect Duke with the single conspiracy involving Barbine and his entire Ohio group. In short, there was no showing that Duke had any interest about or knowledge of his suppliers; thus, under this Court's reasoning in United States v. Peoni, 100 F.2d 401 (2d

Cir. 1938) and similar cases cited in Duke's main brief, (pp. 25-30) the proof adduced at trial showed multiple conspiracies.

POINT IV

LOOKING AT THE UNIQUE CIRCUMSTANCES OF THIS
CASE AS A WHOLE, SUBSTANTIAL JUSTICE WAS DENIED
DUKE, AND HE IS ENTITLED TO A NEW TRIAL

The contested issue with respect to defendant Duke was a relatively simple one: Was Albert Duke the man who met with Agent Hauss and passed him the stolen stock? Except for the identification by the FBI agents, there was virtually no evidence against Duke; hence, the admission of his conviction for a prior similar crime and of co-conspirator statements must have had a profound effect on the jury's determination that Duke was the man who had dealt with the FBI and that his four alibi witnesses were either mistaken or lying. To then use the statements made by that man to the FBI to support the admission of the very co-conspirator statements that influenced the determination that that man was Duke is circular reasoning -- and fundamentally unfair.

Analysis of the Government's evidence against Duke, as the Government itself marshalled it in its brief (Br. 35-37), shows the independent "non-hearsay"

evidence against Duke consisted of the following:

- (1) Niang and Williams met frequently with Duke (although there was no testimony as to what was said).
- (2) A man identified by the FBI as Duke gave stolen stock to Agent Hauss.
- (3) That man made several allegedly incriminating statements to Hauss.

Thus, other than the evidence concerning the person identified by the FBI as Duke, all of the non-hearsay evidence against Duke, according to the Government itself, consisted of the bare fact that there were meetings between Niang, Williams and Duke.

All the other evidence against Duke consisted of extrajudicial statements which Niang and Williams, about which Barbine testified, such as the alleged statement of defendant Williams that "he was going to give [the securities] to a guy named Duke" (Trial transcript, 176-77). These statements must have had a great effect on the jury's determination that it was in fact Duke who had met with Agent Hauss. It is, therefore, circular to use the statements made to Agent Hauss as evidence to allow in the hearsay declarations, when it was those very hearsay declarations which were used to convince the jury that

Duke was the person who had made the statements to Hauss. This unfairness was exacerbated by the admission of Duke's prior conviction for a similar crime, which must also have influenced the jury to decide that Duke was the man who had met with Agent Hauss.

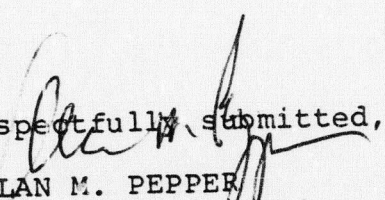
It ill behooves the Government to argue here that Duke's defense was weak because his "alibi witnesses were substantially impeached." (Br. 44) It was the Government which chose to introduce this extraneous and prejudicial evidence, which prevented the jury from making a simple decision weighing the credibility and recollection of Duke's alibi witnesses against those of the FBI agents. This is best exemplified by the Government's insistence on introducing Duke's prior conviction, supposedly on the issue of knowledge and intent -- and in the face of a proposed stipulation by Duke's counsel -- when testimony of FBI Agent Hauss, if believed, was replete with admissions of the person with whom he dealt that the stock was stolen.

CONCLUSION

For the reasons set forth above and in Duke's main brief, the judgment of conviction should be reversed.

Dated: New York, New York
November 9, 1977

Respectfully submitted,


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UNITED STATES COURT OF APPEALS
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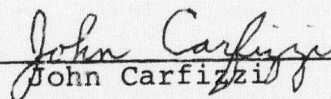
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

JOHN CARFIZZI, being duly sworn, deposes and says that he is employed by the law firm of Kaye, Scholer, Fierman, Hays & Handler, is over the age of eighteen and not a party to this action.

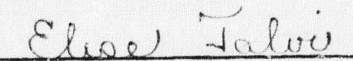
On November 9, 1977, deponent served true copies of the annexed Reply Brief of Defendant-Appellant Albert Duke by depositing the same, enclosed in sealed postpaid envelopes in the post office box regularly maintained by the U.S. Postal Service at 425 Park Avenue, New York, New York, addressed to the following attorneys:

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John Carfizzi

Sworn to before me this
9th day of November, 1977


Notary Public

ELISE TALVI
Notary Public, State of New York
No. 03-4614387
Qualified in Bronx County
Commission Expires March 30, 1979

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U. S. ATTORNEY
SO. DIST. OF N. Y.

ROBERT B. FISKE JR.